No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JERRY WARTSKI, JAY WARTSKI and ALAN WARTSKI, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.Does the failure of the government to provide a property owner notice and an opportunity to be heard prior to the seizure of a multi-million dollar apartment building, as this Court held was required by the Fifth Amendment in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), require the dismissal of the forfeiture action?

2.In light of the teaching of this Court in *Austin v. United States*, 113 S. Ct. 2801 (1993), that 21 U.S.C. § 881(a)(7) was intended to punish "only those involved in drug trafficking," may the government invoke § 881(a)(7) to forfeit and take a multi-million dollar apartment building from a property owner who was not involved in any drug trafficking, and who took reasonable steps to prevent drug trafficking on the property, based on a finding that the owner did not literally take *every* reasonable step to prevent such activity?

3.If so, does the forfeiture, pursuant to 21 U.S.C. § 881(a)(7), of an entire apartment building from a property owner who was not involved in any drug trafficking violate the Excessive Fines Clause of the Eighth Amendment, where the government could have taken only the leasehold interests of the tenant wrongdoers?

LIST OF PARTIES

In addition to those listed on the cover, petitioners include 560 Realty Company,[1] s/h/a 560 Realty Corporation, the claimant below, and the *in rem* defendants—All Right Title and Interest in Real Property and Appurtenances Thereto Known As 558-560 West 165th Street, New York, New York, Listed As Block 2122, Lot 77 and Leasehold and Tenancy Interests Therein of Apartments 2A2, 2A6, 2C6, 3C3, 3D2, 3D3, 3D5, 4B1, 4B6, 4D2, 4D5, 4D7, 5A1, 5A2, 5A3, 5A4, 5D1 and 7C1.

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[1] There are no parent companies or subsidiaries of 560 Realty Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JERRY WARTSKI, JAY WARTSKI AND ALAN WARTSKI, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Jerry Wartski, Jay Wartski and Alan Wartski, general partners of 560 Realty Company ("560 Realty"), petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit is unreported and is reprinted in the appendix below ("Pet. App.") at 1a. The Memorandum Endorsed decision of the United States District Court for the Southern District of New York denying defendants' motion for judgment notwithstanding the verdict, for a new trial or for dismissal is unreported and is reprinted at Pet. App. 7a. The Judgment of Forfeiture of Real Property and Building of the United States District Court for the Southern District of New York is unreported and is reprinted at Pet. App. 9a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Fifth Amendment provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The relevant provisions of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 2050, as amended, 21 U.S.C. § 881(a)(7) (Supp. 1994), are reproduced below at Pet. App. 11a.

The relevant provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, Title II, Pt. E, Sec. 511, as amended, 21 U.S.C. § 881(b) (1984 & Supp. 1994), are reproduced below at Pet. App. 12a.

STATEMENT OF THE CASE

Jerry Wartski, Jay Wartski and Alan Wartski are the general partners of 560 Realty. This case arises out of the forfeiture to the United States of America of the Wartski family's land and an entire apartment building containing 210 single room occupancy residences ("SROs"), four apartments, and seven commercial establishments. The land and apartment building that were taken from the Wartskis are located in Washington Heights—an area of New York City that, despite well-publicized efforts of law enforcement authorities, remains one of the most drug-infested neighborhoods in the country. The government sought forfeiture

based on the unlawful conduct of residential tenants and their invitees. Neither 560 Realty, the owner of the property, nor any of its partners, members of the Wartski family, nor any of its employees is alleged to have taken part in any drug-related activity.

1. Through 560 Realty, the Wartskis purchased the land and apartment building at 558-560 West 165th Street, New York, New York (the "Property") in April 1976. 560 Realty held nearly 100 percent of the equity in the Property, which was subject only to a mortgage in the amount of $50,000. The entrance to the residential portion of the building is on West 165th Street. Entrances to the seven stores are around the corner, on Broadway.

The Wartskis owned, operated, and collected the rents on the Property until the government seized the Property on October 23, 1992, without providing them any notice or opportunity to be heard. Thereafter, the government operated and collected the rents on the Property for more than one year before a judgment of forfeiture was entered on December 10, 1993, in a lawsuit in which jurisdiction was premised on the *ex parte in rem* seizure.

When the Wartskis purchased the Property in April 1976, the Property had no exterior lighting, no office on the first floor, no front desk person, and no security whatever. There is no evidence that there was any illegal drug activity or drug-related arrests at the Property from 1976 until 1987. By the end of 1986, however, illegal drug activity permeated the area around the Property.

Through warrant searches executed by the police and conversations with the police and the district attorney's office, the Wartskis became aware of the illegal drug activity that was occurring at the Property. As a result, the Wartskis took numerous security measures to combat this problem—measures that went far beyond anything required by the New York City Housing Maintenance Code (6 New York City Admin. Code §§ 27-2001

through 27-2152 (1995)).[2] The Wartskis also commenced eviction proceedings whenever the police informed them of drug-related arrests or seizures of drugs or drug-related paraphernalia in specific apartments.[3]

In addition to taking these unilateral steps to keep drug dealers out of the apartment building, the Wartskis repeatedly communicated with law enforcement authorities and offered to (1) employ an undercover police officer as a porter in the building, (2) establish a satellite office in the premises for use by the police, (3) provide space in the premises for a fixed post, and (4) reimburse the city for the salary of an officer assigned to the Property

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[2] The security measures taken by the Wartskis included:

- moving their office from the basement of the building to the first floor;
- requiring a clerk to sit at a desk behind a plexiglass window toward the vestibule of the building 24 hours per day;
- locking the outer door to the building;
- installing a camera in the outer vestibule of the building;
- installing a buzzer, activated by the clerk behind the plexiglass window, on the inner door to the vestibule 24 hour per day;
- instituting a more stringent rental application procedure;
- hiring a security agency to enhance security;
- hiring individual security guards to enhance security;
- hiring armed, retired or off-duty police officers and corrections officers;
- instituting a visitation policy that prohibited visitors from entering the building after 10:00 p.m.;
- firing employees suspected of drug dealing or possessing drugs;
- instituting a card swipe system at the front door of the building operable by cards issued to legitimate tenants;
- remastering the locks in the building and giving the keys to the police; and
- permitting the police full access to patrol the building.

[3] In New York City, it is virtually impossible to evict a tenant based on the tenant's narcotics activity, absent conviction based on the sale, as opposed to the mere possession, of narcotics.

full time. The Wartskis also proposed to the district attorney that they would lock out tenants of apartments in which drug activities had been discovered by the police, provided the district attorney's office would cooperate in defending any illegal lock-out cases that ensued. None of these proposals was accepted by the district attorney's office.

2. Not satisfied with any of the preventive measures that the Wartskis took with respect to the Property, nor willing to agree to any additional measures that they could take with the assistance of the district attorney's office, and apparently recognizing the herculean problem faced by the Wartskis, from April 1992 through September 16, 1992, the authorities undertook an investigation of Euclides Rosario Lantigua ("Euclides"), a suspected high-level cocaine distributor who was a tenant in one of the apartments. Euclides allegedly utilized several apartments at the Property to implement his narcotics operation. Euclides, who had been a tenant in the building for more than seven years, had no history of prior arrests. The investigation included physical surveillance, pen registers, court-ordered eavesdropping on two telephone lines, a court-ordered search warrant, confidential informants, undercover police officers, and a review of assorted documents, including reports and laboratory analyses—techniques not available to individual property owners such as the Wartskis. The authorities did not share either the fact or results of their investigation of Euclides with the Wartskis. That intensive investigation yielded no evidence of any involvement in drug trafficking by the Wartskis or by any of their employees.

On September 16, 1992, the police arrested Euclides and his network. One month after the arrest of Euclides, during which there were no drug arrests at the Property, the government seized the Property, including all seven stores and more than 150 residences not even alleged to have been associated with any drug-related activity at any time.

3. The government commenced this action on October 22, 1992, by filing under seal a verified complaint seeking forfeiture of the property pursuant to 21 U.S.C. § 881(a)(7). On the same day that the government filed its complaint, the government obtained, *ex parte*, an *in rem* seizure warrant pursuant to 21 U.S.C. § 881(b) for the real property, apartment building and 18 leasehold interests sought by the government in its complaint.

By enacting 21 U.S.C. § 881(a)(7) in 1984, Congress expanded the federal drug forfeiture laws to apply for the first time to real property, where there is probable cause to believe that the property was used in some part to facilitate drug trafficking. Unlike in many earlier forfeiture statutes, however, Congress circumscribed the government's power to forfeit real property under § 881(a)(7) by incorporating an express "innocent owner" defense: No real property may be forfeited where the owner establishes that the drug activity upon which the forfeiture would be based occurred "without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7).

Notwithstanding this important limitation on the government's power to forfeit real property, the government did not, in its *ex parte* application for the seizure warrant, address the availability to the Wartskis of the innocent owner defense. Nor did the government advise the district court of any of the security measures taken by the Wartskis or inform the court of the Wartskis' requests for increased police presence on their property and their offers to pay the cost of stationing a police officer at the premises.

In issuing the seizure warrant, the district court found probable cause to believe that the Property had been used in some part to facilitate drug trafficking, but made no findings as to whether or not the Wartski family had consented to such drug trafficking. Again, without providing the Wartskis any notice or opportunity to be heard, the government seized the Property the

next day, October 23, 1992. The Wartskis filed their notice of claim to the Property on October 28, 1992.

4. The case was tried more than one year after the seizure. Upon the court's stipulated determination that the government had probable cause to believe that the Property was used in some manner or part to commit or facilitate felony violations of the drug laws, the matter was submitted to a jury to determine whether the Wartskis had proved that they had not consented to such use of the Property.

At trial, the Wartskis introduced evidence of the numerous steps that they took to prevent the use of the Property for such purposes, including the hiring of security personnel, the redeployment of existing personnel, the installation of security equipment and implementation of security measures, the provision of master keys to the police, and the granting of permission to the police to conduct patrols of the building. In response, the government argued that the security measures undertaken by the Wartskis had not been carried out effectively, and that there were additional preventive steps that the Wartskis could have taken.

The government's evidence showed that only a portion of the 214 residences, and none of the stores, was connected in any way to illegal drug activity.[4] The government introduced no evidence reflecting any involvement by the Wartskis in any drug-related

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[4] The government introduced evidence that, over a period of four years, police searches uncovered drugs or drug-related paraphernalia at one time or another in approximately 48 of the 214 residences. (Due to the transient nature of the SRO population, these residences housed more than 600 different individuals during this four-year period.) Of the 76 arrests arising out of these searches, 21 resulted in convictions. Of these 21 convictions, eight resulted from arrests that occurred outside the apartment building, or in the lobby of the building after the police had cornered suspects who were prevented from entering the building by the locked second door at the entrance.

activity, nor did the government produce any evidence that 560 Realty or the Wartskis benefitted in any manner from having persons lease apartments from them who were involved in the illegal sale of narcotics. Indeed, the government's witnesses acknowledged that the Wartskis had consistently cooperated with police requests for assistance or information.

5. Over the Wartskis' objection, the district court instructed the jury that it was required to find that the Wartskis consented to illegal drug trafficking on their Property even if they had acted reasonably to *prevent* drug trafficking on the Property, unless the jury found that the Wartskis had literally taken *every* reasonable step to prevent such activity. (Pet. App. 13a-17a). Applying that definition of "consent," which, as a practical matter, amounted to a standard of strict liability, the jury returned a verdict on December 8, 1993, forfeiting the Property to the United States. This was reportedly the largest forfeiture of property in a case in which the owners were not charged with any crime. Without making any findings whether the forfeiture violated the Excessive Fines Clause of the Eighth Amendment, the district court entered a Judgment of Forfeiture of Real Property and Building on December 10, 1993. (Pet. App. 9a).

6. Three days after entry of the judgment of forfeiture, this Court issued its decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) ("*Good*"), holding that 21 U.S.C. § 881(b) violated the Due Process Clause of the Fifth Amendment, insofar as it permitted the seizure of real property for forfeiture pursuant to § 881(a)(7) without notice to the owner and an opportunity for the owner to be heard. The decision in *Good* overruled, in part, a prior holding of the Court of Appeals for the Second Circuit in *United States v. 141st St. Corp.*, 911 F.2d 870, 875 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). In *141st St. Corp.*, the Second Circuit had held that prior notice and a hearing are required only when a property owner's personal residence is seized. *Good* made clear that the due process requirements

of prior notice and an opportunity to be heard extend to all real property seizures, not just seizures of property owners' residences.

7. By notice of motion filed December 27, 1993, the Wartskis moved (1) for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 59, (2) for a new trial pursuant to Fed. R. Civ. P. 50(b), on the grounds that (a) the district court erroneously instructed the jury on the issue of consent, and (b) newly discovered evidence required a retrial, and (3) for dismissal of the complaint, on the grounds that (a) under this Court's decision in *Good*, the government's seizure of the Property, without prior notice and an opportunity to be heard, violated the Due Process Clause of the Fifth Amendment, and (b) under this Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), the forfeiture was disproportionate and excessive under the Excessive Fines Clause of the Eighth Amendment. The district court denied the Wartskis' motions by memorandum endorsed decision dated April 25, 1994. (Pet. App. 7a-8a).

8. The Court of Appeals for the Second Circuit affirmed. The Court held that the Wartskis had waived their right to contest the forfeiture of the Property based on a seizure without prior notice or an opportunity to be heard, because they had not raised the issue before the entry of the judgment of forfeiture, notwithstanding that this Court's decision in *Good*, which changed the law in the Second Circuit by holding such *ex parte* seizures invalid, was not rendered until three days *after* the entry of the judgment. (Pet. App. 2a-3a). The Court's finding of a waiver under such circumstances conflicted with the contrary holding of the Eighth Circuit in *United States v. 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994). In addition, the Court of Appeals contradicted an express holding of this Court in *Good* when it determined that exigent circumstances, precluding any prior notice or opportunity to be heard, existed because searches and arrests had not halted the drug-related activity in and in front of the building.

The Court of Appeals further held that, even if the seizure was illegal, there was no error in admitting as evidence the fruits of the seizure—rent records and $20,000 cash and a weapon retrieved from a closet maintained by the building manager (who continues to operate two stores at the Property as a tenant of the government). The Court acknowledged that an unlawful seizure may result in the exclusion of improperly obtained evidence, but held that the Wartskis also waived this point, which, like the principal argument for dismissal, was premised on the post-forfeiture judgment decision of this Court in *Good*. (Pet. App. 4a). Without mentioning the decision of the Court of Appeals for the Eighth Circuit in *9638 Chicago Heights*, which held that dismissal of the government's complaint, rather than exclusion of improperly obtained evidence (if any), was the appropriate remedy where the government seizes real property without according the owner prior notice and a hearing, the Court further observed that "[i]t is well-recognized that an illegal seizure of property does not immunize that property from forfeiture." (Pet. App. 4a).

The Court of Appeals also rejected the Wartskis' contention that the innocent owner provision of § 881(a)(7) precluded the forfeiture of their property, since the Wartskis had not consented to any drug trafficking by their tenants, were not themselves involved in any drug trafficking, and had taken reasonable steps to prevent others from engaging in drug trafficking on their property. (Pet. App. 4a-5a). The Court recognized that the Wartskis had unequivocally preserved this point, yet the Court still failed to address the substance of the Wartskis' argument.

The Wartskis had argued that the recent teaching of this Court in *Austin*—that Congress did not intend to forfeit the real property of owners who were not "involved in drug trafficking," 113 S. Ct. at 2811—required the Court of Appeals to revisit and overrule its prior decisions construing the innocent owner provision to preclude forfeiture only where an owner had literally taken "every" reasonable step to prevent such activity by others.

Faced with the contention that the new decision of this Court in *Austin* could not be reconciled with the Second Circuit's precedent interpreting the innocent owner provision, the Court of Appeals responded with the *non sequitur* that the Wartskis' argument was "not consistent with well-established [Second Circuit] precedent. . . ." (Pet. App. 4a-5a (citing Second Circuit cases)). In so ruling, the Court of Appeals failed to come to grips with the fact that its "well-established precedent" conflicted with the teaching of this Court in *Austin*.

Finally, the Court of Appeals declined this Court's invitation to the lower courts, contained in its opinion in *Austin*, to establish a standard for determining when a forfeiture violates the Excessive Fines Clause of the Eighth Amendment. Instead, the Court analogized this case to two earlier Second Circuit cases (*141st St. Corp.* and *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992)), neither of which addressed the Excessive Fines Clause, and both of which involved property owners that were actively involved in drug trafficking. Commenting that the Wartskis were "culpable" because they had not met the unmeetable "all reasonable steps" test for establishing innocent ownership, the Court observed that forfeiture of the Property was no more severe a punishment than had been meted out to the drug traffickers in *141st St. Corp.* or *38 Whalers Cove Drive*, and so did not constitute an excessive fine for Eighth Amendment purposes. (Pet. App. 5a-6a).

REASONS FOR GRANTING THE PETITION

This case presents the Court with opportunities to address two important and troubling aspects of the government's use of the drug forfeiture laws to take private property from persons who are not alleged to have violated any law. First, this case would permit the Court to resolve a conflict between the Second, Eighth and Ninth Circuits as to whether a real property owner has any remedy when the government improperly seizes property without affording

the owner prior notice and an opportunity to be heard. The decision below effectively denied any such remedy. Second, the case would permit the Court to rectify the Court of Appeals' failure to apply the teaching of this Court in *Austin*, that Congress did not intend to forfeit the real property of owners who were not "involved in drug trafficking." A decision by this Court would thus halt the repeated evisceration of the statutory innocent owner defense in § 881(a)(7), under which the government has routinely taken valuable real property from owners who are not alleged to have engaged in any unlawful activity whatever, based on a test that is, in practice, impossible for property owners to meet. A decision by this Court would also resolve several conflicts among the Second, Third, Sixth, Ninth and Eleventh Circuits as to the proper construction of the innocent owner defense contained in § 881(a)(7).

Finally, in the event that the Court were to conclude that the Court of Appeals below correctly applied the statutory innocent owner defense, this case would permit the Court to establish uniform standards for deciding whether the statute, as applied to require forfeiture of an entire apartment building by owners who have engaged in no illegal drug activity, and who have acted reasonably to prevent drug trafficking by others on their property, violates the Excessive Fines Clause of the Eighth Amendment.

I. THE SECOND CIRCUIT'S HOLDING, THAT THE FAILURE TO ACCORD AN OWNER NOTICE AND A HEARING PRIOR TO THE SEIZURE OF REAL PROPERTY DOES NOT REQUIRE DISMISSAL OF A FORFEITURE ACTION, TRIED MORE THAN A YEAR LATER, CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT.

In *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), this Court announced a ruling that is irreconcilable with the position that the government took and the Court of Appeals accepted in this case:

> In sum, based upon the importance of the private interests at risk and the absence of countervailing Government needs, *we hold that the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing*.

Id. at 505 (emphasis added).

In arriving at that holding, this Court expressly rejected the notion that commercial property warrants a lesser degree of due process protection than does a property owner's home, explaining that the private interest at stake in the seizure of *any* real property weighs heavily in favor of a pre-seizure hearing. *Id.* at 501. The Court further observed that the practice of *ex parte* seizure "creates an unacceptable risk of error," in part because the *ex parte* procedure does not even consider, much less adequately address, the potential application of the innocent owner defense available under § 881(a)(7) and in part because the government has a "direct pecuniary interest in the outcome of the proceedings." *Id.* at 501-02.

The Court also rejected the government's contention that compliance with Fourth Amendment standards is sufficient when seizing forfeitable property, explaining that the seizure of property "implicates two '"explicit textual source[s] of constitutional protection,"' the Fourth Amendment and the Fifth." *Id.* at 499 (citations omitted). Because the government "seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself . . . government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 500.

Following *Good*, in *9638 Chicago Heights*, 27 F.3d at 330, and again in *United States v. 2130 W. Harbor Drive*, No. 94-2048, 1995 U.S. App. LEXIS 2706, at *7 (8th Cir. February 14, 1995), the Court of Appeals for the Eighth Circuit held that the

government's unconstitutional seizure of real property pursuant to an *ex parte* seizure warrant required dismissal of the forfeiture action altogether, since the seizure had been based on an invalid warrant.[5] In reaching its conclusion, the Court in *9638 Chicago Heights* rejected the government's contention, accepted by the Second Circuit in *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989) and below, that the only remedy for the harm caused by unconstitutional pre-hearing seizures is the suppression of any evidence gained through such illegal seizures. *9638 Chicago Heights*, 27 F.3d at 330. As the Eighth Circuit explained,

> Suppression of evidence is an appropriate remedy for Fourth Amendment violations because the purpose of the illegal seizure was to preserve or to acquire evidence. However, suppression of seized evidence provides no remedy at all when the purpose of the seizure is not to acquire evidence but to assert a possessory interest over the property.

Id.

The granting of this petition will thus permit the Court to resolve the conflict between the Second, Eighth and Ninth Circuits concerning the appropriate remedy where, as here, the government

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[5] In *United States v. 20832 Big Rock Drive*, No. 93-55281, 1995 U.S. App. LEXIS 7695, at *8-9 (9th Cir. April 7, 1995), the Ninth Circuit held that the government's failure to provide prior notice and a hearing did not require dismissal of the forfeiture action, but further held that, in such cases, the government is "responsible for any 'rents accrued during the illegal seizure'" (quoting *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1384 (9th Cir. 1992), *aff'd in part, rev'd in part*, 114 S. Ct. 492 (1993)).

seizes real property without providing the owner any prior notice or opportunity to be heard.[6]

In *Good*, this Court also expressly considered and rejected the very argument that the government advanced and the Court of Appeals accepted below, concerning the existence of exigent circumstances sufficient to negate the ordinarily applicable requirements of prior notice and a hearing. Acknowledging that the government has legitimate interests at the inception of forfeiture proceedings, including an interest in ensuring that the property not be used for further illegal activity, *Good*, 114 S. Ct. at 503, this Court concluded in *Good* that "[t]hese legitimate interests can be secured without seizing the subject property." *Id.* Holding that the government must employ less restrictive measures when such measures will suffice, *id.* at 503-04, the Court observed that "the Government can forestall further illegal activity [on real property] with search and arrest warrants obtained in the ordinary course." *Id.* at 504.

Even if the government's position on the precise due process issue in this case were not already foreclosed by the decision in *Good*, that position would fail since no exigent circumstances of any sort existed here. The record establishes without contradiction that the Wartskis repeatedly *invited* law enforcement authorities onto the premises and even offered to pay for their presence. The government did not contend below that the presence of law enforcement officers, inside or outside the building, would not have forestalled further drug trafficking. It claimed instead to have

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[6] The pre-forfeiture seizure of the Wartskis' property, in circumstances where a *lis pendens* plainly would have sufficed, was highly prejudicial since, as a result, the jury was confronted with government control of the Property as a *fait accompli*. Thus, in addition to leaving the Wartskis with no remedy at all, the seizure substantially compromised the Wartskis' ability, after the fact, to defend against forfeiture.

declined the Wartskis' request for officers only because other property owners might have sought similar assistance.

While the withholding of such assistance was the government's prerogative, the exercise of that prerogative cannot legitimize an otherwise unconstitutional usurpation of important property rights. The test is whether less restrictive measures available to the government would suffice to protect the government's important interests, *id.* at 505, not whether measures less inconvenient to the government would suffice to protect those interests. Had the district court been apprised that the Wartskis were not merely willing, but anxious to have police present on their property, the court could not have concluded that exigent circumstances required an immediate seizure without notice.[7] The fundamental due process protections recognized in *Good* may not be so readily nullified by the government's untested *ex parte* assertion that less intrusive measures would be insufficient.

In any event, this case will permit the Court to clarify whether the government may establish "exigent circumstances" justifying seizure without notice and without any hearing, expedited or otherwise, where, as here, there is no risk at all of destruction

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[7] Had the Wartskis been given notice of the government's contemplated seizure, the Wartskis would have consented to the temporary closure of part or all of the Property under New York City's Nuisance Abatement Law (1 New York City Admin. Code §§ 7-701 through 7-722 (1994)). Alternatively, the Wartskis would have welcomed the forfeiture of the leasehold interests of any and all tenants who were engaged in unlawful activity. Forfeiture of these leasehold interests would have accomplished what the Wartskis could not otherwise have lawfully accomplished—the eviction of tenants involved in drug-related activities who had not been convicted of any drug trafficking crime. Apart from everything else, the government waited for six weeks after the arrest of Euclides before bringing this action. It should not be heard to protest that exigent circumstances precluded any notice at all to the Wartskis.

or concealment of the property, on the naked claim that law enforcement authorities could not halt, through searches and arrests, all drug activity in an apartment building located in a neighborhood that is plagued with drugs.

The Court of Appeals accepted the government's argument that it need not address the serious due process claims that were raised by the Wartskis because, although those claims were raised in the district court by a post-judgment motion for judgment as a matter of law, that motion was not preceded by a motion for a directed verdict raising the same claims. In fact, these important legal claims would be appropriate for appellate consideration even if they had not been raised in the district court at all.

First, the purpose of the general requirement that post-verdict motions for judgment as a matter of law be preceded by motions for a directed verdict—to allow the non-moving party an opportunity to cure any deficiency in its proof that may have been overlooked—was not served by application of that rule here. The Wartskis' Fifth Amendment due process claim did not require any further evidentiary record, and would not, in any event, have properly been submitted to the jury. This claim was fully presented to the trial court, which could have ruled based on the evidence of record. Indeed, in addition to finding a waiver of the due process claim, the Court of Appeals in fact addressed that claim, however erroneously, on the merits.

Second, the Wartskis raised their objection to the seizure of their rental property without notice or a hearing, promptly upon the announcement of this Court's decision in *Good*. Before *Good*, the law in the Second Circuit clearly did not require such notice and hearing. *See 141st Street Corp.*, 911 F.2d at 874-75. The *Good* decision established for the first time that owners of rental and commercial property targeted by the government for forfeiture are entitled to the same due process protections as are homeowners. Since the *Good* decision was not even rendered until after entry of

the judgment in this case, the Wartskis could not have moved for a directed verdict on this issue, and therefore were not required to do so. *See Hegger v. Green*, 646 F.2d 22, 26-27 (2d Cir. 1981); *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1151-52 (7th Cir. 1978). Under nearly identical circumstances, the Court of Appeals for the Eighth Circuit addressed a property owner's due process claim under *Good* even though the claim had not been raised in the district court at all. *9638 Chicago Heights*, 27 F.3d at 329-30. *See also 20823 Big Rock Drive*, 1995 U.S. App. LEXIS 7695, at *7 (applying *Good* retroactively).

In support of its finding of a waiver, the Court of Appeals incorrectly noted that, "even before . . . *Good*, the rule in this Circuit was that, absent exigent circumstances, seizure without notice violates the due process rights of an owner." (Pet. App. 3a (citing *4492 S. Livonia Road*, 889 F.2d at 1263-65)). In fact, the decision in *Good* fundamentally changed the due process analysis applicable to seizures of real property under § 881(a)(7) in the Second Circuit. As the government itself expressly advised this Court in its brief in *Good*, "the Second Circuit has declined to apply the preseizure adversary hearing requirement of *Livonia Road* to the seizure of rental or commercial property. *United States v. 141st Street Corp.*" Brief for the United States, 1992 WL 528507, at *22 n.14, *United States v. James Daniel Good Realty*, 114 S. Ct. 492 (1993) (No. 92-1180) (citation omitted). Given its own representation to this Court that the position advanced by *Good* would change everything, the government should not have been heard to argue that that position, once accepted by this Court in *Good*, changed nothing.

Finally, this Court has considerable discretion to resolve issues not initially raised in the district court. Especially where, as here, an important constitutional issue is presented, and the resolution of that issue requires no further evidentiary record, appellate consideration is appropriate. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981) (failure to object to jury

charge on punitive damages); *see also Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54-55 (2d Cir. 1978) (failure to move for directed verdict on sufficiency of evidence). To the extent necessary, discretion should be exercised to resolve the issues raised by the Wartskis on the merits.[8]

The Wartski family has suffered the loss of an extremely substantial property interest in violation of its due process rights under the Fifth Amendment. In light of the substantial due process claim raised by the Wartskis, the importance of the issue to real property owners generally, the enormity of the punishment visited upon the Wartskis and the conflict between the Second, Eighth and Ninth Circuits on the issue, the Court should exercise its considerable discretion to address the due process claim on the merits, even if the Court were to conclude that the claim was not otherwise correctly preserved for appellate review.

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[8] The government itself only recently succeeded in obtaining appellate review from the Court of Appeals of an important legal claim, notwithstanding the government's failure to raise the issue at the proper time below. In *United States v. 16.03 Acres of Land*, 26 F.3d 349 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 899 (1995), the trial court had declined to approve the condemnation of all of the property that the government sought to take. Even though the government had participated, without objection, in a hearing concerning the reasonableness of the government's proposed condemnation, the Second Circuit addressed and sustained the government's argument on appeal that the determination of the extent of the property to be condemned was committed entirely to the discretion of the Secretary of the Interior:

> *Regardless of when the government raised the matter*, because a question pertaining to the scope of judicial review is a significant and purely legal issue, we will address the government's contention. . . .

26 F.3d at 354 (emphasis added).

II. THE FORFEITURE OF REAL PROPERTY FROM AN OWNER WHO WAS NOT INVOLVED IN ANY DRUG TRAFFICKING, AND WHO TOOK REASONABLE STEPS TO PREVENT DRUG TRAFFICKING ON THE PROPERTY, IS CONTRARY TO THE INTENT OF CONGRESS AS ESTABLISHED BY THIS COURT IN *AUSTIN v. UNITED STATES*, AND IS BASED ON A CONSTRUCTION OF THE STATUTORY INNOCENT OWNER DEFENSE THAT CONFLICTS WITH DECISIONS OF THE THIRD, SIXTH AND NINTH CIRCUITS.

The single most important issue at the trial of this action was whether or not the Wartskis—the principals of 560 Realty—gave their "consent," within the meaning of § 881(a)(7), to the unlawful activity carried on by others at the Property. As the district court recognized, the statutory definition of consent was "crucial" to the outcome of the jury's deliberations.

The district court and the Court of Appeals below held that the government could invoke § 881(a)(7) to forfeit and take from the Wartski family a multimillion dollar apartment building, notwithstanding that the Wartskis were not alleged to have been involved in drug trafficking, and notwithstanding that they took reasonable steps to prevent drug trafficking on the Property, based on a finding that the Wartskis "consented" to such drug trafficking because they did not literally take *every* reasonable step to prevent such activity. That holding is irreconcilable with the teaching of this Court in *Austin*, that § 881(a)(7) was intended to punish "only those involved in drug trafficking." *Austin*, 113 S. Ct. at 2811.

The decision of the Court of Appeals below also conflicts with the decision of the Sixth Circuit in *United States v. Lots 12, 13, 14 & 15, Keeton Heights Subdivision*, 869 F.2d 942, 946-47 (6th Cir. 1989), which held that § 881(a)(7) "imposes no requirement that a person who claims the status of 'innocent owner' establish that he has done all that he could reasonably be expected

to do to prevent the proscribed use of his property." *Accord United States v. Certain Real Property*, 724 F. Supp. 908, 914 (S.D. Fla. 1989); *United States v. One Parcel of Real Estate Consisting of Approximately 4,657 Acres*, 730 F. Supp. 423, 427 (S.D. Fla. 1989); *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 50 n.4 (E.D.N.Y. 1989).

In addition to its disagreement with the Sixth Circuit concerning the meaning of "consent" in § 881(a)(7), the Second Circuit (and the Eleventh Circuit) also disagrees with the Third and Ninth Circuits as to whether, in order to establish statutory innocent ownership, a claimant must show both lack of knowledge and lack of consent, *e.g.*, *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989); *United States v. One Parcel of Land, Known as Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990), or whether a showing of lack of consent is sufficient, *e.g.*, *141st St. Corp.*, 911 F.2d at 877-90; *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1500 (11th Cir. 1992); *see also United States v. 7326 Highway 45 N.*, 965 F.2d 311, 315 (7th Cir. 1992) (noting, but declining to address, conflict among Second, Third and Sixth Circuits concerning standards for statutory innocent ownership); *20832 Big Rock Drive*, 1995 U.S. App. LEXIS 7695, at *24 (characterizing innocent owner provision as "far from lucid"). In sum, judicial interpretation of the innocent owner defense contained in § 881(a)(7) is in a state of disarray.

Notwithstanding the Wartskis' objection, the district court charged the jury—no fewer than ten times—that, to establish lack of consent, the Wartskis were required to prove not merely that they acted reasonably to prevent the illegal drug activity, but that they took "*all* reasonable steps to prevent the illegal drug use of their premises" (Pet. App. 16a) (emphasis added). Lest there be any confusion, the court further clarified that this required the jury to

find that the Wartskis "took every action that was reasonable under the circumstances" *Id.* at 15a.[9]

This charge was inconsistent with this Court's admonition in *Austin* that, by inclusion of the innocent owner defense in § 881(a)(7), Congress evinced its intention "to punish *only those involved in drug trafficking*." 113 S. Ct. at 2811 (emphasis added). In *Austin*, this Court observed that, unlike traditional forfeiture statutes, 21 U.S.C. §§ 881(a)(4) and (a)(7) expressly provide for "innocent owner" defenses, and that these exemptions "focus the provisions on the culpability of the owner." *Id.* at 2810-11. The Court further recounted that an analogous statutory provision, 19 U.S.C. § 1618, "demonstrated Congress' intent 'to impose a penalty only upon those who are significantly involved in a criminal enterprise.'" *Id.* at 2811 (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971)). The Court thereupon concluded that "[t]he inclusion of innocent-owner defenses in §§ 881(a)(4) and (a)(7) reveals a similar congressional intent to punish *only* those involved in drug trafficking." *Id.* at 2811 (emphasis added). Since the instructions provided to the jury in this case took no account whatsoever of whether the Wartskis were "involved in drug trafficking," the instructions flew squarely in the face of this Court's teaching that, in fashioning the statutory

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[9] The government sought below to render more palatable the trial court's instruction to the jury by summarizing it as a requirement that the owners have shown that they did "all that reasonably could be expected of them under the circumstances." Though ambiguous, that formulation might at least have permitted the jury to find a lack of consent if it found that the owners had acted reasonably, even if the jurors could conceive of some reasonable step that the owners did not take. In fact, however, at the government's insistence the charge made clear—repeatedly—that the Wartskis were required to show that they took "*every* action that was reasonable" and "*all* reasonable steps" to prevent illegal drug use. (Pet. App. 15a (emphasis added)).

innocent owner defense, Congress intended to punish only those involved in such activity.

In charging the jury as it did, the district court relied on the decision of the Second Circuit in *141st St. Corp.*, 911 F.2d at 879, which in turn referred to "the *Calero-Toledo* standard."[10] In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which was decided a decade before the enactment of § 881(a)(7), this Court held that "forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocent[] [parties]." *Id.* at 680. In dicta, the Court cautioned that the broad sweep of forfeiture statutes could give rise to serious constitutional questions if an owner of property "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689.[11]

Thus, the Court in *Calero-Toledo* did not announce any innocent owner standard at all. It merely observed that a forfeiture scheme that did not include any innocent owner defense would be constitutionally suspect at least in the hardest case—where the property owner not only was completely unaware of the illegal

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[10] At the time that the Court of Appeals decided *141st St. Corp.*, this Court had provided no guidance in construing the statutory innocent owner provision in § 881(a)(7). Acknowledging that other courts had reached contrary conclusions, *e.g. Lots 12, 13, 14, & 15, Keeton Heights Subdivision*, 869 F.2d at 946-47; *171-02 Liberty Ave.*, 710 F. Supp. at 49-50, the Court of Appeals reasoned that "Congress ha[d] left to the courts the task of interpreting and refining the term 'consent,'" and concluded, in the absence of controlling authority, that the "all reasonable steps" formulation was most appropriate. *141st St. Corp.*, 911 F.2d at 879.

[11] Though referring to "the *Calero-Toledo* standard" in *141st St. Corp.*, the Second Circuit did not actually require the showing posited by this Court, since it did not require that the owner prove that "he was . . . unaware of the wrongful activity." *Calero-Toledo*, 416 U.S. at 689.

activity but also had literally taken every reasonable step to prevent the illegal activity. The Court simply did not address whether a forfeiture of property would also be constitutionally suspect in a case where the property owner had become aware of wrongful activity and proved that he had thereafter acted reasonably, but could not claim to have literally taken every reasonable step to combat the wrongdoers. Obviously, the Court did not purport to apply any particular statutory innocent owner provision.[12]

Indeed, in upholding the validity of the forfeiture under attack in *Calero-Toledo*, this Court expressly distinguished it from forfeitures under 19 U.S.C. § 1618—a statute in which the Court found Congress had, by the inclusion of an innocent owner provision, manifested its intention "'to impose a penalty only upon those who [were] significantly involved in a criminal enterprise.'" 416 U.S. at 688 (quoting *United States v. United States Coin & Currency*, 401 U.S. at 721-22). Specifically referring to 19 U.S.C. § 1618, this Court in *Austin* instructed that the innocent owner provision in § 881(a)(7) similarly evinced Congress' intent to punish "only those involved in drug trafficking." *Austin*, 113 S. Ct. at 2811.

As this Court recognized in *Austin*, there is no evidence that when Congress incorporated innocent owner defenses into § 881(a)(7) and the other greatly expanded forfeiture provisions of § 881, it sought to push § 881 to the brink of unconstitutionality by accommodating only the hardest case posited in *Calero-Toledo*.[13]

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[12] *See United States v. 7326 Highway 45 N.*, 965 F.2d at 315 n.2 (noting that dicta in *Calero-Toledo* is not interpretive of subsequently enacted innocent owner provisions of § 881).

[13] As the Court observed in *Austin*, Congress enacted § 881(a)(7) to enhance society's ability "'to deter or punish the enormously profitable trade in dangerous drugs.'" 113 S. Ct. at 2811 (quoting S. Rep. No. 98-225, p. 191 (1983)). Surely, enormously profitable

(continued...)

Thus, by requiring the Wartskis to make the virtually impossible showing that they literally took "every" reasonable step to prevent illegal drug-related activity on the Property, the district court ignored the plain language of § 881, which is not nearly so crabbed as the defense charged to the jury, and committed grievous error.[14]

The issue of the Wartskis' consent was the central issue at trial, and the jury instruction regarding consent was massively prejudicial. The trial court's erroneous instruction led to the anomalous and unjust result that a property owner was found to have "consented" to drug activity on its premises, notwithstanding that the owner had sought to discourage such activity, and had gone so far as to offer to pay for a police substation on the premises, or to pay for the police to place a uniformed officer or an undercover officer on the premises.

Congress has decided that, notwithstanding the government's "war" on drugs, the government should not be permitted to require private property owners to succeed where the police have failed, on pain of confiscation of their property. Having discerned Congress' intent in its opinion in *Austin*, this case will permit the Court to vindicate that important legislative choice.

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[13](...continued)
dealers in dangerous drugs will neither be deterred nor punished by the prospect of other people losing their property.

[14] It is noteworthy that the innocent owner defense that Congress incorporated into § 881(a)(4)(C) (Supp. 1994) precludes forfeitures where the underlying offense is committed "without the knowledge, consent, *or willful blindness* of the owner" (emphasis added). Plainly, if it were necessary, in order to disprove consent, to take every reasonable preventive step, the reference to "willful blindness" would be wholly superfluous, since there could be no circumstance when an owner could establish lack of consent, yet be guilty of willful blindness. Equally plainly, the meaning of "consent" in two such closely related statutory provisions as §§ 881(a)(4) and (a)(7) is the same.

III. FORFEITURE OF THE ENTIRE PROPERTY VIOLATED THE EXCESSIVE FINES CLAUSE SINCE THE OWNER ENGAGED IN NO ILLEGAL CONDUCT, THE PROPERTY WAS NOT DIRECTLY RELATED TO THE UNDERLYING OFFENSES, ONLY A PORTION OF THE PROPERTY WAS THE SITE OF ANY ILLEGAL ACTIVITY AT ALL, AND THE GOVERNMENT COULD HAVE TAKEN ONLY THE LEASEHOLD INTERESTS OF THE TENANT WRONGDOERS.

In *Austin*, this Court reasoned that forfeitures of real property under § 881(a)(7) are focused on the culpability of the owner, are presumptively punitive, and are therefore subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. 113 S. Ct. at 2812. The majority declined, however, to "establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive,'" reasoning that prudence dictated that the lower courts consider the question in the first instance. *Id.* (citations omitted). Since then, as noted below, the several lower courts that have addressed the question, including the Fourth and Eleventh Circuits, are divided as to the appropriate test. Thus, in the event that this Court were to conclude that the courts below properly applied the statutory innocent owner standard, this case would present an opportunity for the Court to define the parameters of a proper excessive fines analysis.

As recognized in *Austin*, in a civil forfeiture of real property under § 881(a)(7), the threshold consideration for purposes of an excessive fines analysis is the conduct of the property owner, since it is the property owner who is punished. 113 S. Ct. at 2811 (Congress intended "to punish only those involved in drug trafficking"); *see also United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 733 n.4 (C.D. Cal. 1994) ("[s]ince the claimant is the person punished for the offense . . . it would be illogical not to consider relevant the extent of the claimant's involvement in the offense").

Thus, the focus must be on the "inherent gravity of the offensive conduct engaged in by the claimant himself, rather than the inherent gravity of the offense or offenses that the government had probable cause to believe were committed on the property." *Id.* at 733.

The judgment in this case, forfeiting the Property to the United States when there was no evidence that the Wartskis committed any crime, when the Wartskis took reasonable steps to prevent drug dealing at the Property, when drug dealing was rampant throughout the Washington Heights area, when drug dealing occurred in only a portion of the 210 SROs in the building and in none of the four apartments and seven physically segregated commercial establishments, and when the government could have forfeited only the leasehold interests of the tenants who were engaged in wrongdoing, violated the Excessive Fines Clause of the Eighth Amendment.

In his concurring opinion in *Austin*, Justice Scalia proposed that consideration be given in excessive fines analysis to the relationship between the real property and the underlying violations of the narcotics laws. According to Justice Scalia, the relevant inquiry to determine if a forfeiture under § 881 is excessive looks to "the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?" 113 S. Ct. at 2815.[15]

In analyzing the relationship between real property and violations of the narcotics laws, the fact that the real property is the place where drugs are sold is of little consequence. As Justice Thomas noted in his concurring opinion in *Good*,

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[15] Variants of Justice Scalia's proposed "relationship" or "instrumentality" test have been adopted by several courts. *See, e.g., United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994); *United States v. Rural Route 1*, No. 90 C 4722, 1994 U.S. Dist. LEXIS 1527, at *20 (N.D. Ill. February 4, 1994); *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421, 1429 (M.D. Ala. 1994).

> Under this provision, "large tracts of land [and any improvements thereon] which have no connection with crime other than being the location where a drug transaction occurred," are subject to forfeiture. It is difficult to see how such real property is necessarily in any sense "guilty" of an offense. . . .

114 S. Ct. at 515 (citations omitted). *See also 6625 Zumirez Drive*, 845 F. Supp. at 738 (proposed forfeiture of home linked to illegal activity only by the fact that it was the place at which drugs were sold would constitute an excessive fine).

In applying this relationship or instrumentality test, courts have looked at whether the real property at issue was used in some manner to produce illegal drugs so that its forfeiture would "rid society of the instrumentality of the crime or eliminate the resources of any criminal enterprise." *Id.* at 738; *see also United States v. 566 Hendrickson Blvd.*, 986 F.2d 990, 999 (6th Cir. 1993) (forfeiture where attic was used as a growing room for marijuana); *United States v. One Parcel of Real Property, Known as Plat 20, Lot 17*, 960 F.2d 200 (1st Cir. 1992) (forfeiture where property used to grow 385 marijuana plants); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396 (3d Cir. 1990) (forfeiture where property used to grow and store marijuana); *United States v. Tax Lot 1500*, 861 F.2d 232, 235 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989) (forfeiture where property used to produce marijuana). Since the Property in this case was not used to produce illegal drugs, and since the owner of the Property committed no offense at all, the judgment of forfeiture below constituted an excessive fine under this test.

Other courts, including the Eleventh Circuit, have looked to whether the value of the forfeited property was disproportionate to the misconduct of the owner. *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1498 (11th Cir. 1994); *United States v. One 1988 White Jeep Cherokee*, No. 1993-92, 1994 U.S. Dist. LEXIS 6813,

at *10-13 (D.V.I. April 25, 1994); *United States v. 11869 Westshore Drive*, 848 F. Supp. 107, 111 (E.D. Mich. 1994). *See also United States v. One 1990 Ford Ranger Truck*, 1:92-cv-2240-RCF, 1995 U.S. Dist. LEXIS 2061 (N.D. Ga. February 21, 1995) (combining instrumentality and proportionality of value tests). Here, there can be no question but that the value of the Property was grossly disproportionate to any alleged lack of vigilance on the part of the Wartskis.

A third factor evaluated by other courts in excessive fines analysis looks at the relative proportion of the real property used to facilitate violations of the narcotics laws. While § 881(a)(7) provides for the forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of" the narcotics laws, consideration of the proportion of the real property actually used to facilitate violations of the narcotics laws may assist in determining whether a forfeiture is excessive.

The Property consists of 210 SROs, four apartments and seven stores. Over a four-year period, drugs or drug-related paraphernalia were found in less than one-fourth of the SROs and in none of the apartments or stores. In comparable circumstances, courts have rejected forfeiture of the entire property as excessive. *See 6625 Zumirez Drive*, 845 F. Supp. at 737-38 (forfeiture held excessive where real property at issue consisted of a 3,986 square foot twelve room single family residence and a 1,152 square foot work shop, and narcotics and drug paraphernalia were found in five bedrooms, a shed, and the vegetable garden of the property); *United States v. Shelly's Riverside Heights Lot X*, 851 F. Supp. 633, 637-38 (M.D. Pa. 1994) (forfeiture held excessive where the illegal drug activity was confined to a cabin on a 10-acre parcel of land).

As in *6625 Zumirez Drive* and *Shelly's Riverside Heights*, only a portion of the Property was the site of any violations of the narcotics laws, and the Wartskis would have welcomed the

forfeiture of the leasehold interests of those tenants who were engaged in such conduct. Moreover, none of the seven stores, all of which are physically segregated from the residences, and all of whose entrances are around the corner from the entrance to the residences, were even alleged to have been used to facilitate drug-related activity. Nonetheless, the government seized all of the stores and has now enjoyed the income from those stores for more than two years. Applying the proportionality test, the district court's confiscatory judgment of forfeiture cannot withstand scrutiny under the Excessive Fines Clause.

In sum, since the Wartskis engaged in no illegal conduct whatever, forfeiture of their entire Property, worth millions of dollars, violated the Excessive Fines Clause. Even if other tests are applied, because the Property was not an instrumentality of crime, and because only a fraction of the Property was even the site of a crime, the forfeiture was excessive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 17, 1995

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 27th day of January, one thousand nine hundred and ninety-five.

Present:

Honorable Ellsworth A. Van Graafeiland,
Honorable Ralph K. Winter,
Honorable Pierre N. Leval,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

ORDER
94-6120

v.

JERRY WARTSKI, JAY WARTSKI and ALAN WARTSKI,
Appellants,

560 REALTY COMPANY, s/h/a 560 REALTY CORPORATION,
Claimant,

ALL RIGHT, TITLE and INTEREST IN REAL PROPERTY and APPURTENANCES THERETO KNOWN AS 558-560 WEST 165TH ST., NEW YORK, N.Y., LISTED AS BLOCK 2122, LOT 77 and LEASEHOLD and TENANCY INTEREST THEREIN OF APARTMENTS 2A2, 2A6, 2C6, 3C3, 3D2, 3D3, 3D5, 4B1, 4B6, 4D2, 4D5, 4D7, 5A1, 5A2, 5A3, 5A4, 5D1 and 7C1,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Jerry Wartski, Jay Wartski, and Alan Wartski, as general partners and on behalf of claimant 560 Realty Company (the "Wartskis") appeal from a final judgment of forfeiture entered by Judge Owen following a jury trial. Pursuant to Section 881(a)(7) of Title 21 of the United States Code, the judgment forfeits to the United States all right, title and interest in and to the real property and building located at 558-560 W. 165th Street in Manhattan (the "building"). The Wartskis contend that: (i) the Due Process clause was violated by the lack of pre-seizure notice and hearing, the failure to employ the least restrictive alternative to protect the government's interest, and the improper admission of evidence found as a result of the seizure; (ii) the jury was improperly instructed; (iii) evidence was improperly excluded; and (iv) the seizure violated the Excessive Fines Clause.

First, the Wartskis contend that the Due Process Clause of the Fifth Amendment was violated by the seizure, which occurred without prior notice or adversarial hearing. However, this claim has been waived. The Wartskis raised the issue of pre-seizure notice and hearing only after the return of the jury verdict. It is beyond question that an affirmative defense—any argument that does not tend to controvert the opposing party's prima facie case—is barred if raised for the first time after the return of a jury verdict. *See Sellers v. M.C. Floor Crafters*, 842 F.2d 639, 642 n.2 (2d Cir. 1988); *Doubleday & Co. v. Curtis*, 763 F.2d 495, 503 (2d Cir.), *cert. dismissed*, 474 U.S. 912 (1985); *Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984). The Wartskis had ample opportunity

to challenge the lack of pre-seizure notice and hearing but chose not to raise the issue.

On appeal, the Wartskis seek to excuse their failure to raise the issue on the ground that *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), was not decided until after the entry of judgment in the instant case. But the issue of lack of pre-seizure notice and hearing had been challenged in this Circuit prior to the Supreme Court's decision in *James Daniel Good. See United States v. All Assets of Statewide Auto Parts*, 971 F.2d 896 (2d Cir. 1992); *United States v. 141st St. Corp.*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989). Indeed, even before the Supreme Court's ruling in *James Daniel Good*, the rule in this Circuit was that, absent exigent circumstances, seizure without notice violates the due process rights of an owner. *See 4492 S. Livonia Rd.*, 889 F.2d at 1263-65.

The Wartskis argue that the government failed to employ the least restrictive alternative, thereby failing to demonstrate exigent circumstances. *See James Daniel Good*, 114 S. Ct. at 505 (meeting exigent circumstances test requires government to "show that less restrictive measures . . . would not suffice to protect the government's interests in preventing the sale, destruction, or continued unlawful use of the real property"). Again, this issue was not timely raised in the district court; as a result, the government was not given a full opportunity to introduce evidence showing that forfeiture was the least restrictive measure.

Even if these issues were property raised, exigent circumstances were present and shown, as stated in the seizure warrant. From October 1988 until the seizure in October 1992, the Wartskis' property was the site of numerous drug-related searches, arrests, and investigations, none of which halted the criminal activity. The trier of fact could have found that fully 70 of 210 rooms, including 27 of 36 quadrants and all of the building's floors,

were areas where drug-related activity took place. Drug trafficking occurred in front of the building and in common areas of the property. The continued illegal activity presented a danger to the community. The building manager was shown to be fully aware of the drug activity, while the Wartskis failed to take reasonable steps to prevent drug trafficking on their own property. Moreover, there existed serious doubts as to the Wartskis' ability to avoid compromising police action were prior notice given.

The Wartskis further claim that the "fruits" of the seizure were improperly admitted as evidence as a result of the unlawful seizure. As a result of the building's seizure, the government found in the building manager's closet rent records, cash in the amount of $20,000, and a gun. The manager consented to the search, while the Wartskis disavowed ownership of the closet and its contents. The rent records and testimony about the gun and the $20,000 were entered into evidence at trial without objection to the manner in which they were obtained.

It is well-recognized that an illegal seizure of property does not immunize that property from forfeiture. *United States v. $37,780*, 920 F.2d 159, 163 (2d Cir. 1990). Unlawful conduct in seizure may, however, result in the exclusion of evidence gained from an improper seizure. *4492 S. Livonia Rd.*, 889 F.2d at 1265-66. Here, however, no unlawful seizure occurred, and in any event, the Wartskis waived their objection to the introduction of the evidence. *See United States v. Benitez*, 920 F.2d 1080, 1088 (2d Cir. 1990). We therefore conclude that the trial court did not err in admitting the evidence.

Second, the Wartskis contend that the district court improperly instructed the jury on the issue of the Wartskis' consent to the illegal use of their property. The Wartskis claim that the jury should have been instructed that it did not need to find that the Wartskis took all reasonable steps to prevent the illegal activity, but only that the Wartskis took reasonable steps. This argument is not

consistent with well-established precedent requiring that a property owner take every reasonable step, and do all that can reasonably be done, to prevent the illegal activity. *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 39 (2d Cir. 1994); *United States v. 418 57th Street*, 922 F.2d 129, 132 (2d Cir. 1990); *141 St. Corp.*, 911 F.2d at 878-80.

Third, the Wartskis challenge the district court's exclusion from evidence of a letter allegedly sent from Tim O'Reilly to the Manhattan District Attorney's office. This ruling on admissibility is reviewed for abuse of discretion. *See, e.g., United States v. Caming*, 968 F.2d 232, 238 (2d Cir.), *cert. denied*, 113 S. Ct. 416 (1992). The district court determined that the letter was not subject to a duty to be maintained in regular business records by someone other than its maker. In addition, the letter was not properly authenticated. After reviewing the record, we conclude that the district court did not abuse its discretion in determining that the letter was inadmissible.

Fourth, the Wartskis contend that the forfeiture of the building and real property violated the Excessive Fines Clause of the Eighth Amendment. *Austin v. United States*, 113 S. Ct. 2801 (1993), holds that the Excessive Fines Clause applies to *in rem* civil forfeiture proceedings. In *Austin*, the Supreme Court declined to establish a test of excessiveness, opting instead to allow the lower courts to consider the question. *Id.* at 2812. We have yet to accept the Supreme Court's invitation to consider an appropriate standard and decline to establish such a standard here. As we observed in *38 Whalers Cove Dr.*, 954 F.2d 29, 39 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992), "[w]e need not decide at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, for wherever such a line could be drawn, this forfeiture would be proper." In the instant case, even though no criminal charges were brought against the Wartskis, the Wartskis were culpable in their failure to take all reasonable steps to prevent illegal drug activity on their property. Forfeiture was not excessive given the forfeitures of commercial

buildings in factually similar cases. *See 141st St. Corp.*, 911 F.2d at 881 (upholding forfeiture as not violative of Eighth Amendment when one-third of apartments in building involved in drug trafficking); *38 Whalers Cove Dr.*, 954 F.2d at 38 (upholding forfeiture of condominium).

We therefore affirm.

/s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ Ralph K. Winter
Ralph K. Winter, U.S.C.J.

/s/ Pierre N. Leval
Pierre N. Leval, U.S.C.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	MEMO ENDORSED
-against-	:	92 Civ. 7784 (RO)
ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES THERETO KNOWN AS 558-560 WEST 165TH ST., NEW YORK, NEW YORK., LISTED AS BLOCK 2122, LOT 77 AND LEASEHOLD AND TENANCY INTERESTS THEREIN OF APARTMENTS 2A2, 2A6, 2C6, 3C3, 3D2, 3D3, 3D5, 4B1, 4B6, 4D2, 4D5, 4D7, 5A1, 5A2, 5A3, 5A4, 5D1 and 7C1,	:	
Defendants-in-rem.	:	
560 REALTY COMPANY, s/h/a 560 REALTY CORPORATION,	:	
Claimant.	:	

The motion is denied. There was no motion for a directed verdict at the close of the evidence, and it is a prerequisite for J.N.O.V., 875 F.2d 32, 37. The factual ground for a new trial, the "newly discovered evidence" point requires an observation. There is no affidavit by Mario Burgos, who is clearly in the defendants' control, that the conversation did *not* take place. Accordingly, at best, witness Almanzar was wrong as to when it took place.

Patently, the "newly discovered evidence" would not have affected in the slightest the outcome of this case.

SO ORDERED

/s/ Richard Owen
HONORABLE RICHARD OWEN
UNITED STATES DISTRICT JUDGE

4/25/94

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	JUDGMENT OF FORFEITURE OF REAL PROPERTY AND BUILDING
Plaintiff,	:	
-v-	:	92 Civ. 7784 (RO)
ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES THERETO KNOWN AS 558-560 WEST 165TH ST., NEW YORK, NEW YORK, LISTED AS BLOCK 2122, LOT 77 AND LEASEHOLD AND TENANCY INTERESTS THEREIN OF APARTMENTS 2A2, 2A6, 2C6, 3C3, 3D2, 3D3, 3D5, 4B1, 4B6, 4D2, 4D5, 4D7, 5A1, 5A2, 5A3, 5A4, 5D1 AND 7C1.	:	
Defendants-in-rem.	:	

WHEREAS, a jury trial having commenced before the Honorable Richard Owen, United States District Judge, on November 29, 1993, and at the conclusion of the trial the jury having returned a verdict in favor of the plaintiff, United States of America, forfeiting the real property and building at 558-560 West 165th Street, New York, New York, to the United States,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff United States of America and that all right, title and interest in and to the real property and building known as 558-560 West 165th Street, New York, New York, listed as block 2122, lot 77, be and the same hereby is forfeited to the United States of

America, and that the plaintiff shall have and recover its costs of this action from the claimant, 560 Realty Corporation.

Dated: New York, New York
December 9, 1993

/s/ Richard Owen
HONORABLE RICHARD OWEN
UNITED STATES DISTRICT JUDGE

21 U.S.C. § 881. Forfeitures:

(a) Subject Property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881. Forfeitures:

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-v- 92 Civ. 7784 (RO)

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES THERETO KNOWN AS 558-560 WEST 165TH ST., NEW YORK, NEW YORK, LISTED AS BLOCK 2122, LOT 77 AND LEASEHOLD AND TENANCY INTERESTS THEREIN OF APARTMENTS 2A2, 2A6, 2C6, 3C3, 3D2, 3D3, 3D5, 4B1, 4B6, 4D2, 4D5, 4D7, 5A1, 5A2, 5A3, 5A4, 5D1 AND 7C1.

Defendants-in-rem.

----------x

December 8, 1993
10:50 a.m.

Before:

HON. RICHARD OWEN,

District Judge

* * *

* * *

So, let's turn to consent. Because the claimant on this record, it is acknowledged, knew of the drug activity at the building, it is required to prove it did not consent to such use of its property if it is to avoid forfeiture.

You must examine the acts or failures to act by the claimants or its agents such as what steps it took or might have taken or did not take to rid the property of the drug dealers and determine whether these can be said to be sufficient to show an absence of consent or, on the other hand, constituted the claimant's consent to the use of the premises in the illegal manner alleged.

I tell you that it is the law that once an owner or his agent is on actual notice of illegal drug conduct involving the owner's property, as the claimant was here, *the owner has a duty to do all that reasonably could be*

expected to prevent the further illegal use of its property.

Stated another way, unless an owner with knowledge can prove that it took *every action that was reasonable under the circumstances to curtail the drug-related activity,* consent is inferred and the property is forfeited to the United States.

It is for you to decide, using your common sense, what actions would have comprised a reasonable response by a landlord in these circumstances.

I do instruct you that the claimant is not, however, required to take vigilante action in connection with any drug activity on its premises or to endanger the safety of any of its employees or to engage in conduct which would be wholly futile. However, the claimant is required to prove that it took *all reasonable steps* to this end.

In this connection I remind you again, the government has no burden of proof to show the claimants or its agents did consent, however, it is the claimant who must prove that it did not consent by proving to your satisfaction by a fair preponderance of the credible evidence that it did *everything reasonably to be expected of it to rid itself of the drug problem.*

Now, phrased another way, to show lack of consent, a claimant must prove he did *all that reasonably could be expected to prevent the illegal activity once he*

learned of it.

Consent in this situation is something more than a state of mind. Thus, as you can see, consent in this case is not the colloquial Saturday night version of your son saying, dad, can I have the car to take my girlfriend to the movies, and you say, okay.

Consent, as the law defines it in this case, is the failure to take *all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use.*

Accordingly, you are to look at what the claimant did or did not do under the circumstances. Did it do *all that reasonably could be expected?*

I observe to you that in order to get the building back, you need not find that what they did, the claimant, that is, was successful in whole or in part, but you must find in order for them to get the building back, that they tried, and did as the law requires, take *all reasonable steps to prevent the illegal drug use of their premises once they knew of that drug use.*

So, to sum up, if you find that the claimant, 560, has proven that it did take *all reasonable steps to prevent the drug use of its building,* then the claimant did not consent to its use for that purpose and you are to find that the building is to be returned to the claimant.

On the other hand, if you find that the claimant

has failed to prove that it did take *all reasonable steps to prevent the drug use in its building*, that is, that *whatever its actions were they fell short of taking all reasonable steps it could have taken under the circumstances*, then you are to find that the building is forfeited to the United States.

* * *

FILED
JUN 21 1995
OFFICE OF THE CLERK

No. 94-1723

In the Supreme Court of the United States

OCTOBER TERM, 1994

JERRY WARTSKI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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JO ANN HARRIS
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QUESTIONS PRESENTED

1. Whether petitioners waived their right to challenge the seizure of their property without notice and a hearing by failing to raise that claim until after the district court entered a judgment forfeiting that property.

2. Whether petitioners' burden to show that they did not consent, within the meaning of 21 U.S.C. 881(a)(7), to the illegal acts occurring on their property required them to establish that they had taken all reasonable steps to prevent the illegal use of that property.

3. Whether the forfeiture of petitioners' single-room-occupancy apartment hotel constituted an excessive fine, in violation of the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1723

JERRY WARTSKI, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the judgment is noted at 47 F.3d 1159 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1995. The petition for a writ of certiorari was filed on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, the United States District Court for the Southern District of New York entered an order forfeiting, under 21 U.S.C. 881(a)(7), a build-

ing owned by petitioners. The court of appeals affirmed. Pet. App. 1a-6a.

1. Petitioners are the individual and corporate owners of a ten-story, 215-unit, single-room-occupancy apartment hotel (the building) in the Washington Heights section of Manhattan, New York. Between October 1988 and May 1991, the New York City Police Department (NYPD) conducted 23 separate searches of apartments within the building. During those searches, NYPD officers seized at least 37 pounds of cocaine in 30 different apartments, and also seized scales, drug paraphernalia, guns, and cash. In the course of those searches, the police also arrested 55 people for narcotics offenses. Gov't C.A. Br. 3, 4-5. In May 1991, searches were conducted on five different floors of the building, and yielded 11 pounds of cocaine, three firearms, and $31,000 in cash. After each of those searches, a letter was sent to petitioners describing the results of the search. Gov't C.A. Br. 5-6.

On June 12, 1991, an Assistant District Attorney from the New York County District Attorney's office and a New York City Police lieutenant met with petitioner Alan Wartski, the managing partner of petitioner 560 Realty Corporation, and with Harold Rivenburgh, the executive manager of the building. The officials informed Wartski and Rivenburgh of the incidence of drug activity in the building and suggested that they improve their means of screening tenants, and that they contact the police with any information about drug activity in the building.[1]

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[1] Petitioners' records indicated that few tenant files even contained an application for tenancy; that more than 80% of those files had no documentation verifying employment; and

Gov't C.A. Br. 6. After that meeting, police observed additional narcotics-related activity in the building, and additional searches of apartments within the building between June 1991 and November 1991 netted more than six pounds of cocaine, scales, drug records, cash, and a loaded handgun. Gov't C.A. Br. 7-9.

On November 27, 1991, New York City officials met with petitioners and Rivenburgh. At that meeting, the officials again suggested a number of ways to eradicate the drug problem in the building, including requiring that tenants wear photographic identification, hiring 24-hour security guards, and improving the screening of applicants for tenancy. Gov't C.A. Br. 10. Petitioners instead suggested that the police aid them in "locking out" tenants, but the city officials rejected that proposal on the ground that it might be illegal. The city officials also declined petitioners' request that an NYPD officer be stationed full time in the building at petitioners' expense, on the grounds that the officer would effectively be serving as a private security guard and that acceding to that request could obligate the NYPD to provide similar service to all landlords who had a drug problem in their buildings. The officials did, however, supply petitioners with the name of a private guard service. Gov't C.A. Br. 10-11.

After that meeting, petitioners sent New York officials a proposed "contract," in which petitioners would have agreed to lock out illegal subtenants, to require visitors between 6:00 p.m. and midnight to sign in and be admitted by a legal tenant, to seal any apartment in which an arrest or seizure was made for

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that the applications that had been received were often undated or unchecked by petitioners. Gov't C.A. Br. 7.

at least 60 days, and to report any suspected drug activity to the police, and in which the officials would have agreed, *inter alia*, to forgo taking legal action against the building. In a letter response, an assistant district attorney informed petitioners that the proposed visitors policy would be inadequate because drug activity occurred at all hours of the day and night and that it would be illegal to lock out any tenant who had lived in an apartment 30 days or more. The assistant district attorney also informed petitioners that a written agreement with the city was unnecessary and that petitioners were free to take selected action on their own to eliminate the drug problem in the building. Gov't C.A. Br. 12-13. In their response to that letter, however, petitioners again conditioned their willingness to take remedial steps on a written agreement with the district attorney's office. Petitioners made no further effort to contact the District Attorney's office or the two police officers responsible for the investigation of drug trafficking at the building. Gov't C.A. Br. 13.

On December 11, 1991, NYPD officers searched apartment 5A2 of the building, which was assigned to the building's manager, who was also its managing agent. During the search officers found .9mm ammunition, and a police dog detected a strong scent of narcotics on the floor of the apartment. After that search, an NYPD sergeant informed Rivenburgh and petitioner Alan Wartski of his concern that the building manager might be involved in drug trafficking and that the matter warranted investigation. Between February and April, seven more searches of apartments in the building yielded additional cocaine, scales, paraphernalia, drug records, and $4,000 cash. Gov't C.A. Br. 14.

Between April and September 1992, the NYPD conducted an undercover investigation of a cocaine trafficking organization operated out of the building by Euclides Lantigua. In May and June 1992, undercover officers made two purchases of cocaine from a Lantigua associate in an apartment in the building. On August 5, 1992, officers seized 22 pounds of cocaine from Lantigua's apartment and arrested three of Lantigua's associates; on September 16, 1992, officers searched three apartments used by Lantigua's organization, seized paraphernalia, drug records, and $13,000 cash, and arrested three more of Lantigua's associates and Lantigua himself. The evidence obtained in the undercover investigation showed that Lantigua controlled as many as ten rooms in the building, and that the building manager not only knew of Lantigua's drug business, but had permitted one of Lantigua's associates to rent two apartments under a false name. Gov't C.A. Br. 15-16.

2. On October 22, 1992, the government filed a verified complaint under seal seeking forfeiture of the building under 21 U.S.C. 881(a)(7), which provides for the forfeiture of property used or intended to be used in the commission of a felony drug offense. On the same day, a federal district judge issued an ex parte seizure warrant for the building. The court found probable cause to believe both that the building was subject to forfeiture and that exigent circumstances justified the seizure of the building without prior notice. Gov't C.A. Br. 17-18. On October 23, 1992, the United States Marshals Service seized the building. Gov't C.A. Br. 18. At the time of the seizure, the NYPD executed search warrants in 17 apartments and seized a total of five pounds of cocaine, one loaded weapon, scales, paraphernalia, and $2,000 cash. Gov't

C.A. Br. 18-19. Petitioner 560 Realty Corporation filed a claim to the building and an answer to the complaint. Neither that claim nor the answer, however, challenged the propriety of the pre-notice seizure or the forfeiture of the entire building. Gov't C.A. Br. 19.

3. At trial, petitioners stipulated that the government had probable cause to obtain forfeiture of the building. Petitioners defended against the forfeiture on the ground that they were innocent owners because they had not consented to the drug activity that occurred in the building. The district court instructed the jury that to find that petitioners did not consent to the illegal activity, it must find that petitioners had done all that reasonably could be expected of them under the circumstances. Gov't C.A. Br. 19-20. The jury found the building subject to forfeiture. Gov't C.A. Br. 20.

After the entry of judgment, petitioners filed a motion for judgment notwithstanding the verdict and for a new trial, alleging, for the first time, that the seizure of the building had violated their rights under the Due Process Clause and that the forfeiture had constituted an excessive fine under the Eighth Amendment. Gov't C.A. Br. 20-21. The district court denied the motions. The court noted that petitioners had failed to move for a directed verdict at the close of the evidence, which is a prerequisite to moving for a judgment n.o.v. Pet. App. 7a-8a; Gov't C.A. Br. 21.

4. The court of appeals affirmed. Pet. App. 1a-6a. The court held that, by failing to raise their claims under the Due Process Clause until after the jury's verdict, petitioners had waived any claim that the seizure of the building without prior notice or adversarial hearing was unconstitutional. The court

of appeals declined to excuse petitioners' failure to raise the issue of pre-seizure notice before trial on the ground that *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), which held that the Due Process Clause ordinarily requires pre-seizure notice, had not been decided until after trial in this case. The court noted that "even before the Supreme Court's ruling in *James Daniel Good*, the rule in this Circuit was that, absent exigent circumstances, seizure without notice violates the due process rights of an owner." Pet. App. 3a. In any event, the court of appeals held, "exigent circumstances were present and shown," because the widespread and ongoing drug-related activity in front of the building and in the building's common areas "presented a danger to the community." *Id.* at 3a-4a.

The court of appeals also rejected petitioners' claim that the district court should have instructed the jury that, if it found that petitioners had taken reasonable steps to prevent the illegal use of their property, petitioners had not "consented" to that activity. The court held that the proposed instruction was inconsistent with Second Circuit precedent, which permitted a property owner to establish that he did not "consent" to illegal activity within his building only if he had "take[n] every reasonable step, and do[ne] all that can reasonably be done, to prevent the illegal activity." Pet. App. 4a-5a.

Finally, the court held that the forfeiture of the building did not violate the Excessive Fines Clause of the Eighth Amendment. Pet. App. 5a-6a. The court declined to adopt a standard for assessing the point at which a forfeiture violates the Excessive Fines Clause because it found that "wherever such a line could be drawn, this forfeiture would be proper." *Id.*

at 5a (quoting *United States* v. *38 Whalers Cove Drive*, 954 F.2d 29, 39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992)).

ARGUMENT

1. Petitioners contend (Pet. 12-19) that the court of appeals erred in rejecting their post-trial claim that the absence of notice and an adversary hearing before the seizure of their property violated their due process rights. The court of appeals correctly held that petitioners waived that claim by failing to assert it in a timely manner in the district court.

In *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993), this Court held that, "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." The Court further held that "[t]o establish exigent circumstances, the Government must show that less restrictive measures * * * would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property." *Ibid.*

The courts below correctly rejected petitioners' challenge to the absence of pre-seizure notice and a hearing on the ground that petitioners—unlike the property owner in *James Daniel Good*—failed to challenge that aspect of the seizure before the jury's verdict and accordingly waived their right to do so. Federal Rule of Civil Procedure 8(c) provides that a party, in a responsive pleading, "shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmative defense." See also Fed. R. Civ. P. 12(b) ("Every defense, in law or fact, to a claim

for relief in any pleading * * * shall be asserted in the responsive pleading thereto."). An "affirmative defense" includes "[a]ny matter that does not tend to controvert the opposing party's prima facie case as determined by the applicable substantive law." 2A J. Moore, *Moore's Federal Practice* ¶ 8.27[3] (2d ed. 1995). In light of the "mandatory language" of Rule 8(c), "a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation." *Doubleday & Co.* v. *Curtis*, 763 F.2d 495, 503 (2d Cir.), cert. dismissed, 474 U.S. 912 (1985). See also C. Wright & A. Miller, *Federal Practice & Procedure* § 1278, at 477 (2d ed. 1990) ("Generally, a failure to plead an affirmative defense results in waiver of that defense and its exclusion from the case."). Petitioners' challenge to the absence of pre-seizure notice and a hearing is an affirmative defense within the meaning of Rules 8(c) and 12, because it did not controvert the merits of the government's request for forfeiture, but instead requested dismissal for failure to comply with pre-seizure procedural requirements. As the court of appeals observed (Pet. App. 22-32), petitioners' failure to raise that issue until after the district court had entered its judgment precluded petitioner from raising it on appeal, and petitioners supply no authority to the contrary.

Petitioners claim (Pet. 17) that the court of appeals' reliance on their waiver was misplaced because no "further evidentiary record" would have been necessary for the courts below to determine whether their rights under the Due Process Clause had been violated. That claim fails because, although courts of appeals may consider purely legal arguments that a party did not raise in a timely fashion, see *United States* v. *Strahl*, 958 F.2d 980, 983 (10th Cir. 1992);

United States v. *Barnett*, 935 F.2d 178, 180 (9th Cir. 1991), a decision to entertain a new argument is purely discretionary. Because petitioners' argument took the form of an affirmative defense, which Rules 8(c) and 12(b) expressly require will be raised before trial, the court of appeals' refusal to consider petitioners' untimely argument was a reasonable exercise of discretion.[2]

Petitioners also contend (Pet. 17-18) that their failure to raise their due process claim was justified because this Court did not announce its decision in *James Daniel Good* until four days after the district court entered the forfeiture judgment against the building. For several years, however, the courts of appeals had been in conflict on the issue that was resolved in *James Daniel Good*; moreover, this Court granted certiorari in *James Daniel Good* in March 1993, eight months before the trial in this case. Thus, petitioners were on notice, before trial, that the absence of pre-seizure notice and a hearing was a potential affirmative defense.[3] Cf. *Reed* v. *Ross*, 468

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[2] Petitioners also challenge (Pet. 15-17) the court of appeals' alternative holding (Pet. App. 3a-4a) that the government had demonstrated that exigent circumstances justified dispensing with the ordinary requirements of pre-seizure notice and a hearing. Petitioners do not, however, seek review of that holding, and they have not asserted that the application below of the exigent circumstances exception conflicts with any other reported decision.

[3] Before this Court's decision in *James Daniel Good*, the Second Circuit had required the government to give pre-seizure notice when it seized residential property, see *United States* v. *4492 S. Livonia Road*, 889 F.2d 1258, 1262-1265 (1989), but not when it seized commercial property, see *United States* v. *141st Street Corp.*, 911 F.2d 870, 874-876 (1990), cert. denied,

U.S. 1, 13, 14-15 (1984) (claim is not so "novel" as to justify failure to raise it on direct appeal unless it is one as to which counsel has "no reasonable basis upon which to formulate" a legal objection).

Petitioners also claim (Pet. 13, 18) that the decision below conflicts with the decisions in *United States* v. *9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994), and *United States* v. *2130 W. Harbor Drive*, 48 F.3d 289 (8th Cir. 1995). In both of those cases, the Eighth Circuit, relying on *James Daniel Good*, directed a district court to dismiss a forfeiture complaint because the government had not provided the claimants with pre-seizure notice and a hearing. In *2130 W. Harbor Drive*, however, the claimant had preserved his Due Process claim in the district court by arguing in a pretrial motion to dismiss that he had been denied procedural due process because he had not received a pre-seizure hearing. See 48 F.3d at 291. And in *9638 Chicago Heights*, the court of appeals did not address any claim of waiver on appeal. The

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498 U.S. 1109 (1991). Although the decision in *141st Street Corp.* would have foreclosed a claim that the lack of pre-seizure notice and a hearing violated the Due Process Clause, petitioners offer no explanation of why they failed to preserve that issue while *James Daniel Good* was pending in this Court. Moreover, the futility of raising a claim does not ordinarily excuse a party from preserving a defense or objection. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982) ("the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial"). Indeed, petitioners made a timely objection to the district court's jury instructions so as to preserve their claim of "consent" within the meaning of 21 U.S.C. 881(a)(7), see pp. 13-15, *infra*, despite the fact that Second Circuit law had squarely precluded their argument on that point.

decision in this case therefore conflicts with neither Eighth Circuit decision.[4]

In any event, the question presented by petitioners (Pet. i) has already been answered by this Court in *James Daniel Good*: Even if petitioners had properly preserved their claim under the Due Process Clause, this case would present at most a question of whether the seizure in this case was valid under that decision. Thus, this case presents no question of continuing importance.

2. Petitioners next claim (Pet. 20-25) that the district court erred in instructing the jury that, for petitioners to establish a defense of non-consent, they must show that they took "*all* reasonable steps to prevent the illegal drug use of their premises." Pet. 21. The court of appeals' decision upholding that

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[4] Petitioners also suggest (Pet. 14 n.5) that the decision below conflicts with *United States* v. *20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir. 1995), which held that, where the government has violated the Due Process Clause by failing to provide a property owner with pre-seizure notice and a hearing, the remedy is not dismissal of the forfeiture action but, instead, suppression of evidence traceable to the unlawful seizure. That case does not assist petitioners, however, because petitioners failed properly to challenge the admission of such evidence in this case. See Pet. App. 4a (because petitioners "waived their objection to the introduction of the evidence" obtained as a result of the property seizure, the district court did not err in admitting that evidence). Because the court of appeals did not address—let alone base its decision upon—the issue of what remedy exists in a forfeiture action for impermissibly seizing property without notice and a hearing, its decision does not conflict with the Ninth Circuit's decision in *20832 Big Rock Drive*. Notably, unlike petitioners, the claimant in *20832 Big Rock Drive* raised his due process claim in a pretrial motion.

instruction was correct, and it conflicts with no other court of appeals decision. Review is therefore not warranted.

Section 881(a)(7) provides for the civil forfeiture of any real property used to commit a controlled substance offense. 21 U.S.C. 881(a)(7). The statute, however, contains an exception for property otherwise subject to forfeiture where the owner can show that the act or acts giving rise to the forfeiture were "committed * * * without [his] knowledge or consent." In *United States* v. *141st Street Corp.*, 911 F.2d 870, 878-880 (1990), cert. denied, 498 U.S. 1109 (1991), the Second Circuit adopted a definition of consent under the statute that was based on this Court's decision in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). In *Calero-Toledo*, this Court suggested that forfeiture of an innocent owner's property might be unconstitutional if the owner "had done all that reasonably could be expected to prevent the proscribed use of his property." *Ibid.* The Second Circuit drew on that statement in defining "consent" under Section 881(a)(7), reasoning that the *Calero-Toledo* formulation "provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner." *141st Street Corp.*, 911 F.2d at 879. The court of appeals in this case relied on its earlier decision in *141st Street Corp.* when it rejected petitioners' claim that the district court's instruction had been erroneous.

Petitioners contend (Pet. 20, 22-23) that the court of appeals' definition of consent conflicts with this Court's statement in *Austin* v. *United States*, 113 S. Ct. 2801, 2811 (1993), that "[t]he inclusion of innocent-

owner defenses in [the forfeiture statute] reveals a * * * congressional intent to punish only those involved in drug trafficking." But *Austin* did not construe the text of the innocent-owner provision. Rather, it considered the separate question of whether the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures. The Court's observation in *Austin* regarding the innocent-owner provision formed part of its reasoning in holding that, under the statute, a forfeiture is "properly considered punishment" and hence subject to the Excessive Fines Clause. *Id.* at 2810. The decision in *Austin* does not suggest that the government is categorically precluded from obtaining forfeiture of property where the owner of the property did not himself commit the drug crimes that occurred on the property. On the contrary, Section 881(a)(7) textually requires forfeiture of real property used in felony drug offenses, except where the property owner establishes that those offenses occurred without the "knowledge or consent" of the owner.

Petitioners also assert (Pet. 20-21) that the decision below conflicts with *United States* v. *Lots 12, 13, 14 and 15, Keeton Heights Subdivision*, 869 F.2d 942 (6th Cir. 1989). Petitioners rely on the statement in that case that Section 881(a)(7) "imposes no requirement that a person who claims the status of an 'innocent owner' establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property," because "[i]t is enough, under the statute, that the owner establish that his proscribed act was committed 'without the knowledge or consent of that owner.'" 869 F.2d at 947. There is, however, no actual conflict between that case and this case, because the Sixth Circuit did

not address the issue of whether a judge may properly use the *Calero-Toledo* formulation to elucidate the meaning of "consent" under the statute. The Sixth Circuit's holding was simply that summary judgment was not appropriate for the government, because the property owner had properly preserved her innocent owner defense for trial. See *id.* at 948 ("It remains to be seen, of course, whether Mrs. Allen will be able to establish that her [cocaine-dealing] husband was in fact acting without her knowledge or consent. She, not the government, will have the burden of proof on that issue.").[5]

3. Finally, relying on *Austin* v. *United States*, petitioners argue (Pet. 26-30) that the forfeiture of the building constituted an excessive fine, in violation of the Eighth Amendment. In particular, petitioners assert (Pet. 30) that the forfeiture of the entire building is disproportionate to the amount of illegal activity that occurred there.

In *Austin*, this Court held that the Excessive Fines Clause applies to civil in rem forfeitures under 21 U.S.C. 881 (1988 & Supp. V 1993), because the protection of the Clause is not limited to criminal proceedings and the civil forfeiture at issue was punitive in effect. 113 S. Ct. at 2806-2812. The Court

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[5] Petitioners also assert (Pet. 21 (citations omitted)) that "the Second Circuit * * * disagrees with the Third and Ninth Circuits as to whether, in order to establish statutory innocent ownership, a claimant must show both lack of knowledge and lack of consent, * * * or whether a showing of lack of consent is sufficient." Whatever the merits of that claim, the asserted conflict is not presented in this case, because petitioners have conceded that they knew of the narcotics trafficking at the building, and the sole question therefore is whether they had demonstrated their lack of consent.

in *Austin*, however, expressly declined to adopt a test for determining whether a forfeiture is constitutionally "excessive," leaving that issue for initial exploration by the lower courts. *Id.* at 2812. The Court stated that it would not "rule out the possibility that the connection between the property and the offense may be relevant" to the determination of excessiveness, but emphasized that its decision did not preclude the lower courts "from considering other factors" that might also be germane to that inquiry. *Id.* at 2812 n.15. In a concurring opinion, Justice Scalia suggested that the sole measure of an in rem forfeiture's excessiveness is whether the property was "properly * * * regarded as an instrumentality of the offense"—in other words, "*whether* the confiscated property has a close enough relationship to the offense." *Id.* at 2815.

Since *Austin*, the courts of appeals have had few occasions to consider the appropriate measure of excessiveness under the Constitution. The one circuit to do so, the Fourth Circuit, has drawn upon Justice Scalia's concurrence in *Austin* and adopted a three-part test to determine whether the property at issue was an "instrumentality in the commission of the offense." See *United States* v. *Chandler*, 36 F.3d 358, 365 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). Two other courts have, in dicta, expressed dissatisfaction with exclusive reliance on the relationship between the property and the offense and have urged that other factors be taken into account. See *United States* v. *9638 Chicago Heights*, 27 F.3d 327, 330-331 (8th Cir. 1994); *United States* v. *Premises Known as RR No. 1*, 14 F.3d 864, 873 (3d Cir. 1994). Neither court, however, has announced a definitive test of its own, nor have any other courts of appeals

done so. Because the courts of appeals have not had sufficient opportunity to develop standards for evaluating claims of excessiveness, it is premature for this Court to grant certiorari to consider that issue.

In any event, this case does not present an appropriate vehicle for considering the excessive fines issue, because, as the court of appeals held (Pet. App. 5a), the forfeiture of petitioners' building was not excessive under any conceivable standard. Under an inquiry into whether the building was an "instrumentality" of the offenses in question, forfeiture was clearly appropriate, because the building was repeatedly used as the site of large-scale drug offenses. The evidence at trial established that during a four-year period, cocaine, weapons, scales, paraphernalia, and cash were repeatedly seized from the building. Indeed, the evidence established that approximately 70 of the 215 single rooms in the building, located on all floors, had been either the site of drug related searches, seizures, and arrests, or had been rented to drug dealers. Police officers also made seizures and arrests in common areas of the building, including the lobby and hallways.

Likewise, under a "proportionality" analysis, forfeiture of the building was proper. As we have noted, the evidence showed that the building's executive manager not only knowingly rented blocks of rooms to drug dealers, but was also apparently involved in drug dealing himself. Moreover, the jury was instructed that it could not find in favor of the government if it found that petitioners had done everything that they reasonably could have to curtail the drug trafficking. The jury's verdict was supported by the trial record, which demonstrated peti-

tioners' unwillingness—despite the repeated admonitions of local officials—to take action to prevent drug trafficking in the building.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JERRY WARTSKI, JAY WARTSKI and ALAN WARTSKI, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Jerry Wartski, Jay Wartski and Alan Wartski (collectively, "the Wartskis"), general partners of 560 Realty Company ("560 Realty"), submit this reply brief in further support of their petition for a writ of certiorari ("Petition" or "Pet.") pursuant to Rule 15.6 of the Rules of this Court.

By this reply brief, the Wartskis respond to certain of the contentions raised by the government in its brief in opposition to the Petition ("Brief in Opposition" or "Brief in Opp."), and refer the Court to several decisions that have been handed down since the filing of the Petition, all of which further reflect splits in Court of Appeals authority warranting that the Petition be granted.

ADDITIONAL REASONS FOR GRANTING THE PETITION

In the Petition, the Wartskis argued that certiorari should be granted (i) to resolve the split among the Second,

Eighth and Ninth Circuits as to the proper remedy when the government seizes real property pursuant to 21 U.S.C. § 881(b) without prior notice and an opportunity to be heard, as this Court held was required by the Due Process Clause in its decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) ("*Good*") (Pet. at 12-19), (ii) to resolve the split between the Second and Sixth Circuits as to the meaning of "consent," as Congress used that term in the "innocent owner" provision of § 881(b), and to rectify the government's systematic misapplication of that provision (Pet. at 20-25), and (iii) to define the parameters of a proper analysis under the Excessive Fines Clause of the Eighth Amendment when the government seeks to forfeit real property pursuant to 21 U.S.C. § 881(a)(7), as this Court held was required in its decision in *Austin v. United States*, 113 S. Ct. 2801 (1993) ("*Austin*") (Pet. at 26-30). The sharp divergence of Court of Appeals authority, and the importance of the issues raised by the Petition, are apparent even from the government's Brief in Opposition. Moreover, further developments since the filing of the Petition, with respect to both the due process issue and the excessive fines issue, confirm that this case is worthy of certiorari.

I. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE APPROPRIATE REMEDY FOR THE GOVERNMENT'S FAILURE TO PROVIDE NOTICE AND AN OPPORTUNITY FOR A HEARING BEFORE SEIZING REAL PROPERTY

A. The Wartskis Did Not Waive Their Due Process Right To Notice And A Hearing

The government does not seriously dispute that the decisions of the Eighth Circuit in *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994), and *United States v. 2130 W. Harbor Dr.*, 48 F.3d 289, 291 (8th Cir. 1995), requiring the dismissal of forfeiture actions where the government has failed to provide notice and a hearing prior to the seizure of

real property, are irreconcilable with the Second Circuit's pronouncement below that the failure to accord such notice and a hearing requires no such remedy. Rather, the government asserts, incorrectly, that the Wartskis "supply no authority" (Brief in Opp. at 9) for the proposition that the Court should even reach the issue, given that the Wartskis raised the issue for the first time by post-judgment motion, albeit promptly after the issuance of this Court's decision in *Good*.[1]

In fact, *9638 Chicago Heights* and *2130 W. Harbor Dr.*, both of which were cited in the Petition, support that very proposition. Moreover, since the filing of the Petition, the Sixth, Seventh and Ninth Circuits have joined the Third and Eighth Circuits in holding that the due process issue presented by *Good* should be considered even where judgment was entered prior to the issuance of *Good*, and therefore prior to the raising of the issue by the claimant. *E.g., United States v. 429 S. Main St.*, 52 F.3d 1416, 1419 (6th Cir. 1995); *United States v. All Assets & Equip. of W. Side Bldg. Corp.*, 58 F.3d 1181, 1191 (7th Cir. 1995); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 980 (9th Cir. 1995); *see also United States v. RR No. 1, Box 224, Dalton*, 14 F.3d 864, 869 n.5 (3d Cir. 1994).

In short, *every* other Circuit that has considered the issue has disagreed with the Second Circuit and the government, and has concluded that, so long as a judgment has not become final, the entry of that judgment prior to the decision in *Good* will not preclude enforcement of the important due process rights that were recognized in that case.

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[1] The government acknowledges that, prior to this Court's decision in *Good*, the argument that the Due Process Clause required notice and a hearing prior to the seizure of non-residential real property was foreclosed in the Second Circuit (Brief in Opp. at 10-11 n.3).

B. The Sixth And Seventh Circuits Have Joined The Eighth And Ninth Circuits In Holding That Suppression Of Evidence In Forfeiture Proceedings Is An Inadequate Remedy Where There Has Been A Seizure Of Real Property Without Notice And A Hearing

Subsequent to the filing of the Petition, a district court, in *United States v. 2030 E. Monroe St.*, 884 F. Supp. 1218 (C.D. Ill. 1995), noting the split among several circuits, interpreted the Sixth Circuit's decision in *United States v. 16510 Ashton*, 47 F.3d 1465 (6th Cir. 1995), as mandating the dismissal of a forfeiture action where there has been a seizure of real property without notice or a hearing. *2030 E. Monroe St.*, 884 F. Supp. at 1225 n.2. In contrast, the Second Circuit would merely exclude at trial any evidence obtained as a result of such seizure.

As recounted by the court in *2030 E. Monroe St.*, the Sixth Circuit, in *16510 Ashton*, 47 F.3d at 1471 (citing *Good*, 114 S. Ct. at 505), reversed the district court's grant of summary judgment in favor of the government, noting that the government's failure to provide the property owner with a pre-seizure adversarial hearing to contest the government's showing of probable cause and to establish himself as an innocent owner was "dispositive." Thus, the Sixth Circuit has joined the Eighth Circuit in requiring the dismissal of forfeiture actions where there has been a seizure of real property without notice and a hearing. *Cf. 429 S. Main St.*, 52 F.3d at 1421 (remanding to district court without reaching issue of remedy).

Moreover, also subsequent to the filing of the Petition, the Seventh Circuit, joining the Ninth Circuit, disagreed with both the Second and Eighth Circuits and held that an owner in a forfeiture proceeding is entitled to lost rents, and possibly other damages, arising from the unlawful seizure of real

property without notice or a hearing, but is not entitled to dismissal of the proceedings altogether. *E.g., All Assets and Equip. of W. Side Bldg. Corp.*, 58 F.3d at 1193; *see also 6380 Little Canyon Rd.*, 59 F.3d at 981. A grant of certiorari in this case would thus permit this Court to resolve the several splits among the circuits as to the proper remedy in a forfeiture action where, as here, there has been a seizure of real property without notice and a hearing.[2]

II. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE PROPER INTERPRETATION OF THE "INNOCENT OWNER" PROVISION OF SECTION 881(b)

The government's Brief in Opposition fails to come to grips with the patent conflict addressed in the Petition between the Second Circuit's decision, requiring a claimant to show that it took "all reasonable steps" to prevent drug activity on its property, and the Sixth Circuit's decision in *United States v. Lots 12, 13, 14, & 15, Keeton Heights Subdivision*, 869 F.2d 942 (6th Cir. 1989), specifically instructing that no such showing is necessary. Rather, by describing the jury charge as requiring only that the Wartskis show that they did "all that reasonably could be expected of them under the circumstances[,]" the government apparently seeks, as it did in

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[2] Acknowledging that Petitioners do "challenge (Pet. App. at 15-17) the Court of Appeals' alternative holding (Pet. App. at 3a-4a) that exigent circumstances justified dispensing with ordinary requirements of pre-seizure notice and a hearing" (Brief in Opp. at 10 n.2), the government nonetheless erroneously asserts that Petitioners do not seek review of that holding. On the contrary, such a challenge is plainly subsumed within the first Question Presented in the Petition, *i.e.*, whether the government's failure to provide notice and a hearing, as required by *Good*, requires dismissal of this forfeiture action.

the Court of Appeals, to avoid the consequences of its own insistence that the jury in fact be instructed that the Wartskis had to show that they took "every action that was reasonable" and "all reasonable steps" to prevent drug trafficking. *Compare* Brief in Opp. at 6 *with* Pet. App. at 14a-17a.

Nor has the government, by characterizing this Court's interpretation of the innocent owner provision in *Austin* as an "observation" that "formed part of [the Court's] reasoning" (Brief in Opp. at 14), rendered that interpretation any the less irreconcilable with the markedly counterintuitive conception of "consent" that was applied by the courts below. The Court's teaching in *Austin*, that the innocent owner provision reflects Congress' intention that real property be forfeited only from persons "involved in drug trafficking," was integral to the Court's holding in that case, and simply cannot be squared with the position that the government takes here.

III. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE PROPER PARAMETERS FOR AN EXCESSIVE FINES ANALYSIS IN THE CONTEXT OF AN *IN REM* FORFEITURE

The government contends that a grant of certiorari to consider the Excessive Fines claim raised by the Wartskis would be premature because only the Fourth Circuit, in *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995), in addition to several district courts, has announced a definitive standard for conducting an Excessive Fines analysis (Brief in Opp. at 16-17). Subsequent to the filing of the government's Brief in Opposition, however, the Second and Ninth Circuits have also definitively addressed the Excessive Fines issue. *E.g., United States v. Milbrand*, 58 F.3d 841, 845-48 (2d Cir. 1995); *6380 Little Canyon Rd.*, 59 F.3d at 981-87.

Both the Second and Ninth Circuits disagree with *Chandler*, in particular with respect to the importance to the analysis of the culpability of the owner relative to the value of the property to be forfeited. Thus, a grant of certiorari is warranted at this time to resolve this important conflict.

As the Second Circuit noted in *Milbrand*, "the Fourth Circuit has largely adopted the instrumentality analysis espoused by Justice Scalia." 58 F.3d at 846. The *Milbrand* Court, however, held "that appropriate excessiveness analysis entails a multi-factor test combining the principles of both instrumentality and proportionality." *Id.* at 847. The Ninth Circuit, in contrast, perceived the instrumentality test as, in effect, synonymous with the threshold statutory standard for forfeitability. *6380 Little Canyon Rd.*, 59 F.3d at 982 ("the forfeiture must be determined to have been proper. That is, the property must have been an 'instrumentality' of the crime...."). Noting this Court's teaching in *Austin* that, "[f]or purposes of the Excessive Fines Clause, 'the question is not...whether forfeiture...is civil or criminal, but rather whether it is punishment,'" 59 F.3d at 983, (quoting *Austin*, 113 S. Ct. at 2806), the Ninth Circuit in *6380 Little Canyon Rd.* concluded that "[o]nly by adding a proportionality test is the 'excessiveness' of the fine determined by weighing both the *in rem* and *in personam* punishments against the seriousness of the crime." 59 F.3d at 983.

The Ninth Circuit emphasized in *6380 Little Canyon Rd.* that, because it is the owner who is punished by the forfeiture, it is the owner -- not tenants or other third parties -- whose conduct must be weighed:

> [T]he worth of the property must be "proportional (not excessive) to the culpability *of the owner* .... [U]nder the "proportionality" test, forfeiture of the property must not impose upon

> the owner a penalty grossly disproportionate *to his offense.*

Id. at 982 (emphasis added). In conducting the proportionality analysis, the court further instructed that, "[i]n any instance in which forfeiture of a single tract would contravene the Excessive Fines Clause, the court should limit it to an appropriate portion or the more poisonously tainted portion of the property."

The government substantially distorts the Wartskis' contention with respect to the Excessive Fines Clause, reciting that, "[i]n particular, petitioners assert (Pet. at 30) that the forfeiture of the entire building is disproportionate to the amount of illegal activity that occurred there." (Brief in Opp. at 15). Petitioners do contend that only a portion of the residences at the property -- and none of the physically segregated income producing stores -- was the site of any drug-related activity. They also contend that the property was not the instrumentality of any drug activity. But the crux of the matter is that the Wartskis are innocent of *any* drug activity. The verdict below establishes only that the jurors were able, during the course of their deliberations, to come up with at least one possible additional step that the Wartskis could have taken to prevent drug activity, which step could be characterized as reasonable. The taking by the government of a multi-million dollar residential and commercial building from persons not involved in any drug activity, based on such a finding is both excessive and reprehensible.[3]

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[3] Casting about for some justification for this untoward result, the government irresponsibly speculates that the desk clerk (misidentified as the "executive manager") was himself "apparently involved in drug dealing," based on evidence that a police dog was thought to have detected the scent of narcotics

(continued...)

As the court observed in *6380 Little Canyon Rd.*, "proportionality analysis is especially appropriate in the civil forfeiture context because it is the sovereign that profits from such forfeitures." *Id.* at 984. The Court should grant certiorari to establish uniform standards for conducting this sensitive and critical analysis.

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[3](...continued)
on the floor in his private residence. (Brief in Opp. at 4, 7). The government further incorrectly asserts, without benefit of any record citation, that the desk clerk "knowingly rented blocks of rooms to drug dealers" (Brief in Opp. at 17), apparently based on evidence that, *after* the rooms had been rented, the desk clerk accepted rental payments from one individual for several rooms. Neither the district court nor the jury ever made any such findings. Moreover, notwithstanding the government's professed grave concern as to the conduct of the desk clerk, it continues to this day to lease a store in the building to this individual.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition should be granted.

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Respectfully submitted,

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